

IP 06-0014-M 1 KPF USA v Crowe
Magistrate Kennard P. Foster

Signed on 01/31/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
ARTEST, WALID,)	CAUSE NO. IP06-0014-CR-01-M/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CAUSE NO. IP 06-0014M-01
)	
KENNETH CROWE,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a complaint filed on January 24, 2006 charging one count of conspiracy to possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II Non-Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The government moved for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(A), (f)(1)(C), and (f)(2)(A) on the grounds that the defendants are charged with a drug trafficking offense with the maximum term of imprisonment of life as prescribed in the Controlled Substances Act, and the defendants are serious risks of flight, if released. The detention hearing was held on January 27, 2006. The United States appeared by Bradley A. Blackington, Assistant United States Attorney. The defendant appeared in person and by his appointed counsel, Juval Scott.

The Court found that the complaint was supported by probable cause to believe that the defendant committed the charged offense. At the detention hearing, the Government rested on

the presumption established by the complaint, the pretrial services report, and testimony from Indiana State Police Trooper Dennis Wade. The Court found that the complaint constituted probable cause to believe that the defendants committed the crime charged. The charge in the complaint gives rise to the presumptions that there is no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendant would not be a serious risk to flee if released..

The evidence presented at the detention hearing did not rebut the presumptions that the defendant is a serious risk of flight or rebut the presumption found in 18 U.S.C. § 3142(e) that the defendant is a danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that by a preponderance of the evidence that the defendant would be a serious risk of flight if released. Consequently, the defendant was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendants are charged in a complaint returned on January 10, 2006 charging one count of conspiracy to possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, a Schedule II Non-Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

2. The penalty for the conspiracy to possess with the intent to distribute and to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), 841(b) and 846 is a mandatory minimum sentence of 10 years and a maximum of life imprisonment. The

defendant has two prior convictions for crimes of violence and would qualify as a career offender pursuant to section 4B1.1 of the United States Sentencing Guidelines.

3. The Court takes judicial notice of the complaint in this cause. The Court further incorporates the evidence admitted during the probable cause and detention hearings, as if set forth here.

4. The government submitted the matter on the complaint and the testimony of Trooper Dennis Wade. Trooper Wade testified that the defendant consented to a search of his hotel room on January 23, 2006 and directed the police to approximately two pounds of methamphetamine. The defendant also admitted that he possessed the methamphetamine. Defense counsel cross-examined Trooper Wade on all issues pending before the Court. The Court admitted the PS3 for the defendant. The defendant has the following criminal convictions: (1) Battery by Means of Deadly Weapon (Aiding) (C-Felony), Putnam County, 12/20/95, Sentence - 4 years (122 days executed) and (2) Robbery (C-Felony), Putnam County, 12/10/97, Sentence - 6 years. The defendant was released from incarceration on April 26, 2004. While on probation for the Battery offense, the defendant violated the terms of his probation and the probation was revoked.

5. The Court finds that the complaint establishes probable cause for the offense charged, and the rebuttable presumptions arise that the defendants are serious risks of flight and dangers to the community. 18 U.S.C. § 3142(e).

6. The evidence at the detention hearing does not rebut the presumptions found in 18 U.S.C. § 3142(e) that the defendant is a serious risk of flight and a danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the

safety of the community, and that by a preponderance of the evidence that the defendant will be a serious risk of flight if released. Therefore, Kenneth Crowe are ORDERED DETAINED.

7. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, § 3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. § 3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same).

In this case, the United States moves for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(A), (f)(1)(C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of § 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination

of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

8. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case. The evidence at the detention hearing did not rebut the presumptions that the defendant is a serious risks of flight and a danger to the community.

10. Assuming *arguendo* the defendants had rebutted both of the presumptions, the defendant would still be detained. The Court considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

11. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

- a. This case charges the defendants based on an incipient conspiracy involving a large quantities of methamphetamine.
- b. The evidence demonstrates a strong probability of conviction as to the defendant.
- c. The defendant faces a mandatory sentence of 10 years imprisonment and, as a career offender, would face a guideline sentence of 360 months to life imprisonment if

convicted at trial. This potential sentence, when coupled with the defendant's prior criminal history, substantially increases the seriousness of his risk for flight.

d. The defendant has previously violated the terms of his probation in Putnam County. This fact renders it less likely that he could comply with terms of pretrial release.

e. The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that defendants have not rebutted the presumptions in favor of detention, and should be detained. Furthermore, they are, by the preponderance of the evidence, serious risks of flight and clearly and convincingly dangers to the community.

WHEREFORE, Kenneth Crowe is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this _____ day of January, 2006.

Kennard P. Foster, Magistrate Judge
United States District Court
Southern District of Indiana

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